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In the Supreme Court of the United States

OCTOBER TERM, 1988

Anthony J. Fagiano, Director of the Department of Insurance; STATE OF IDAHO, as liquidator for Pacific Insurance Administrators, Inc., and Pacific Insurance Administrators Agency, Inc.,
Petitioners,

vs.

UNITED STATES OF AMERICA and the INTERNAL REVENUE SERVICE, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE

The National Association of Insurance Commissioners ("NAIC") is a nonprofit, unincorporated association whose membership consists of the 50 states, the District of Columbia, the territories and insular possessions of the United States. The NAIC was organized in 1871 to assure the protection of policyholders across the country. As stated in the NAIC's Constitution, the protection of policyholders continues to be the principal objective of the NAIC:

Article II. OBJECTIVE

The objective of this body is to serve the public by assisting the several State insurance supervisory officials, individually and collectively, in achieving the following fundamental insurance regulatory objectives:

(1) Maintenance and improvement of State regulation of insurance in a responsive and efficient manner;

(2) Reliability of the insurance institution as to financial solidity and guaranty against loss;

(3) Fair, just and equitable treatment of policyholders and claimants.

II *NAIC Proceedings* p. iii (1988).

The principal function of the NAIC is to serve the public by assisting these insurance commissioners in overseeing the activities of the insurance industry, which activities include the supervision of rehabilitation and liquidation proceedings.

Each commissioner is obligated by law to protect policyholders and in doing so, must carry out all applicable statutory procedures. At issue in this case is whether the Idaho statutory procedures setting forth a priority system for claims payment constitute statutes enacted for the purpose of regulating the "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*,[1] and if so, whether this precludes application of the "super" priority set forth in 31 U.S.C. § 3713[2] to the claims in this liquidation.

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1. Appendix A.
2. Appendix B.

The Idaho statutes are derived from a model law developed by the NAIC, the Insurers Supervision, Rehabilitation and Liquidation Model Act, which has been adopted in some manner by every state. This model law places the claims of policyholders above those of the state or federal government. All states which have adopted this approach are significantly affected by the decision of the Ninth Circuit Court of Appeals and by the recent decision of the Fourth Circuit Court, both of which held that claims of the federal government must be placed ahead of policyholder claims. The individual state commissioners, the members of the NAIC, possess a vital interest in the outcome of this matter because the opinion has a significant impact on policyholders. The decision impairs the ability of the commissioners to fulfill the responsibility vested in them by law to wind up the affairs of insolvent insurance companies, which responsibility includes the paying of policyholder claims.

In submitting this brief, the NAIC seeks to demonstrate its interests in this proceeding, which are:

1. To preserve the orderly disbursement of assets of insolvent insurers,

2. To encourage cooperation and uniformity among states in the liquidation of insolvent insurers, and

3. To assist the state insurance commissioners in protecting the interests of policyholders across the country.

This brief is therefore submitted, with consent of the parties, in support of the petition of the State of Idaho as liquidator for Pacific Insurance Administrators, Inc. and Pacific Insurance Administrators Agency, Inc.

ARGUMENT

I. The Ninth Circuit's decision creates a significant nationwide impact on all state insurance commissioners in the administration or supervision of insolvent insurance companies.

A. The priority scheme for payment of claims which was developed by the NAIC has been widely adopted by the states.

In urging this Court to grant the liquidator's petition, the NAIC seeks to maintain the orderly and uniform distribution of the assets of insolvent insurers. The distribution process will be severely hampered if the Ninth Circuit's decision[3] stands because it will destroy the distribution approach taken by the majority of states.

Idaho's statutory scheme governing liquidation proceedings[4] is patterned after the Uniform Insurers Liquidation Act[5] which is similar to the NAIC Insurers Supervision, Rehabilitation and Liquidation Model Act. The majority of states have endorsed the priority scheme set forth in the NAIC model which places policyholder claims before

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3. *Idaho ex rel. Soward v. Internal Revenue Service*, 858 F.2d 445 (9th Cir. 1988).

4. Idaho Ins. Code § ch.33.

5. The Uniform Insurers Liquidation Act was prepared by the National Conference of Commissioners on Uniform State Laws in conjunction with the NAIC, the Insurance Law Section of the American Bar Association and various state insurance departments. It contains the same principles as the NAIC's model. The Insurers Supervision, Rehabilitation and Liquidation Model Act, Model No. 555, II *NAIC Model Laws, Regulations and Guidelines* (1989). The Uniform Act was intended to facilitate liquidation proceedings and to promote equitable distribution of the assets of defunct insurers. 13 Uniform Laws Annotated 323 (1986).

those of the federal government.[6] This endorsement of the priority scheme is significant because it reflects how fundamental the protection of policyholders is.

If the Ninth Circuit Court's decision is allowed to stand, it will directly impair the states' ability to pay policyholder claims. This impairment will extend nationwide, thereby depriving policyholders across the country of the protection afforded to them by the state priority of distribution laws.

The effect of the Ninth Circuit's opinion also extends to the personal liability of the commissioners as receivers or liquidators of insolvent companies because subsection (b) of 31 U.S.C. § 3713 subjects them to liability if they pay any debts before those of the federal government. The state insurance commissioners generally are obligated by law to appoint a receiver or liquidator to handle the affairs of a financially troubled or insolvent insurance company. The commissioners' responsibility does not conclude once a receiver or liquidator is appointed. The commissioner always maintains supervisory responsibility over the activities of the receiver or liquidator. Therefore, whether directly, or indirectly through appointment of a receiver or liquidator, the commissioner is ultimately the overseer of the company's affairs. The orderly administration of insolvent company affairs has already been thwarted in a number of instances because of the dilemma facing state commissioners as liquidators of the companies. The commissioners are faced with releasing assets of the company to pay claims of the federal government (in contraven-

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6. *See* Appendix C for the text of the priority scheme and Appendix D for a list of those states which have adopted this concept.

tion of the state statutory priority scheme and in disregard for the interests of policyholders) or refusing to release the funds (by obeying state law) and facing personal liability for failure to do so. Either of these alternatives is highly undesirable because the interests of the policyholders are ultimately affected. The policyholders face a delay in claims payment, and very likely no payment at all, as a result of the federal claim for priority.

B. The Ninth Circuit failed to take the philosophy of protecting policyholders into consideration when it rendered its decision.

Placing policyholder claims among those paid first coincides with the fundamental philosophy underlying state insurance regulation. That fundamental tenet is to protect the interests of policyholders. Protecting the interests of policyholders has historically been linked to the monitoring of company solvency. As the NAIC's constitution provides, "[t]he objective of this body is to serve the public by assisting the several State insurance supervisory officials . . . in achieving . . . (2) reliability of the insurance institution as to *financial solidity and guaranty against loss;* . . ." (Emphasis added.) II *NAIC Proceedings* p. iii (1988). The ability of a company to guaranty against loss depends on its financial solidity. That "guaranty against loss" is a protection purchased by a policyholder and it is something which the policyholder is entitled to expect, regardless of the company's financial position.

To carry out this fundamental objective of protecting the interests of policyholders, the insurance commissioners utilize statutory accounting principles, used only by in-

surance companies, to provide a "cushion" to protect the policyholder from the occasional, but sometimes inevitable insolvency. Distribution of the assets comprising this "cushion" is the very essence of state regulation.

In the event that a company becomes insolvent and is unable to fulfill its obligations to policyholders, the state steps in and attempts to fulfill those obligations to the extent possible under the law. The "laws" on liquidation originated decades ago. One of the bases for state laws on liquidation is the NAIC's model on liquidation of insurers.[7] This development of model legislation is one of the methods to encourage cooperation and uniformity among the states in the liquidation process, and it is intended to result in protection of policyholder interests. The Ninth Circuit Court failed to take this fundamental philosophy of protecting policyholders into consideration when it determined that the state's priority scheme for payment of claims is not the "business of insurance."

C. The Ninth Circuit's decision will affect a number of pending liquidation proceedings.

The issue presented in the liquidator's petition is one of widespread significance. It merits review by this Court because of the number of pending insurance company liquidations in which the question is or may become an issue. There are over 30 liquidations currently in process in which the federal priority question has already been or is likely to be raised. In these liquida-

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7. I *NAIC Proceedings* 30-32 (1936). The model was revised extensively in 1978 and continues to be updated. I *NAIC Proceedings* 238-290 (1978).

tions alone, it is estimated that over $30,000,000 in federal claims may be asserted pursuant to 31 U.S.C. § 3713. In several instances the assets of the insolvent company are insufficient to pay both the claims of the federal government and have anything remaining for policyholders and other insureds. In addition, the commissioners in all states are gravely impeded in their ability to proceed with an orderly distribution of assets until this matter is finally resolved. The ambiguity created by the Ninth Circuit's decision needs to be settled in order for these pending liquidation proceedings to move forward.

II. The Ninth Circuit Court erred in concluding that the Idaho priority scheme does not constitute regulation of the business of insurance under the McCarran-Ferguson Act.

The NAIC urges this Court to review the conclusion drawn by the Ninth Circuit that the Idaho scheme governing the priority for distributing assets of insolvent insurance companies does not constitute the business of insurance under the McCarran-Ferguson Act. Whether the members of the NAIC, the insurance commissioners, can continue to carry out their obligation of rehabilitating or liquidating companies is dependent on resolution of this issue. The states have long followed the mandate of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, that the regulation of the business of insurance is vested in the states. A ruling that restricts the scope of state regulation of the business of insurance has a detrimental effect on the insurance commissioners' authority to administer the affairs of insolvent companies across the country.

Different circuits have drawn different conclusions on this same issue. The Ninth Circuit limited its ruling to the issue of whether the priority scheme, not the entire statutory scheme on rehabilitations and liquidations, constitutes the business of insurance. As a result, it appears that the state of Idaho maintains its authority to regulate insolvent insurance companies under Chapter 33 of the Idaho Insurance Code. However, the extent of this authority is not clear. Also, what is not clear is the manner in which assets are now to be distributed. If the priority scheme does not constitute the "business of insurance" under the Ninth Circuit's ruling, exactly how are the assets to be distributed? Without the benefit of the state priority statutes, it would appear that all creditors, including shareholders who may have contributed to the insolvency, would share equally with policyholders any assets remaining after the payment of federal government claims. The absence of a priority scheme creates numerous questions about the entitlement of others, not just shareholders.

The Fourth Circuit, on the other hand, did not limit its holding to the priority section of the Maryland statute at issue. It held that the entire liquidation scheme does not constitute the business of insurance under McCarran-Ferguson.[8] Under the Fourth Circuit Court's opinion, insurance commissioners will not only be forced to relegate payment of policyholder claims to those of the federal government, but their overall authority to administer the affairs of an insurance company is placed into question because of the ruling that these activities do not constitute the business of insurance under the McCarran-Ferguson Act.

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8. *Gordon v. United States Treasury*, 846 F.2d 272 (4th Cir. 1988), *cert. denied* 109 S.Ct. 390 (1988).

A disturbing aspect of these two circuit opinions is the basis on which the conclusions were drawn. The Ninth Circuit Court relied on *Securities and Exchange Comm'n v. National Securities*, 393 U.S. 453 (1969) to justify its decision that the Idaho priority scheme does not constitute the business of insurance while the Fourth Circuit applied the three-part test enunciated in *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), to reach its conclusion that the Maryland statutory scheme does not constitute the business of insurance. Both articulate the meaning of "business of insurance," but for totally different purposes. In *Pireno*, the Court defines "business of insurance" for purposes of triggering the antitrust exemption of the McCarran-Ferguson Act[9] while the determination in *National Securities* was made for purposes other than antitrust. Direction from this Court is crucial in ascertaining the appropriate test for the business of insurance dilemma arising in cases under the McCarran-Ferguson Act.

Regardless of which test is the appropriate test, however, the NAIC maintains that the entire statutory scheme governing the rehabilitation and liquidation of insurance companies constitutes the business of insurance.

Under the three-part test set forth in *Pireno*, three factors are relevant: (1) whether the activity involves the transfer or spreading of risk, (2) whether it involves the relationship between an insurer and insured, and (3) whether the activity is confined to entities within the insurance industry.

1. Transfer or spreading of risk.

The most important factor to consider when analyzing this part of the test is that the policyholder's risk does

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9. 15 U.S.C. § 1013(b).

not automatically cease to exist when a company becomes insolvent. The liquidation of the company inextricably involves the payment of claims which this Court itself has recognized as the business of insurance.[10] Limiting the "spreading of risk" to the period preceding insolvency as the Ninth Circuit suggests does not coincide with the principal goal of state insurance regulation, which is the protection of policyholders. Undue hardship should therefore not be inflicted on the policyholders of an insolvent insurance company. The policyholder should not be burdened with the responsibility of ascertaining the financial condition of the company prior to the placing of his or her business with that company.

A state insurance commissioner undertakes an obligation of administering the affairs of a company if necessary, which may include supervision, rehabilitation or liquidation of the company's affairs. This duty exists from the moment a company receives authorization to conduct business in any given state and extends through the moment the business is finally resolved. The Ninth Circuit makes many references to the fact that the "insurer has ceased to "exist"[11] and that "the company [is] no longer involved in risk protection."[12] These references are inaccurate because the company's charter is not extinguished until the affairs of the company are finalized.

It is also important to note that, in addition to liquidations, rehabilitations are a significant component of a commissioner's duty. Rehabilitations are attempts to maintain the company's existence and do not involve dis-

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10. *Group Life and Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 213 (1979).

11. *Idaho ex rel. Soward v. Internal Revenue Service*, No. 87-4057, slip op. at 10930 (9th Cir. Sept. 7, 1988).

12. *Id.* at 10931.

solution of the company unless necessary. The statutes governing liquidations generally encompass rehabilitations as well, and in these situations the company has definitely not ceased to exist.

2. Relationship between the insurer and insured.

Because the insurer/policyholder relationship continues to exist until the affairs of the insolvent company are resolved, the second criteria of the *Pireno* test is satisfied also. The relationship between the insurer and insured/policyholder is specifically addressed in the NAIC model law governing liquidations and is addressed in every state statute governing this process. The fact that the states have anticipated and have prepared for the distribution of money to pay policyholder claims (by statute) demonstrates that the relationship between the insurer and policyholder continues to exist. The statutes were designed to insure that this insurer/policyholder relationship would be disrupted as little as possible in the event of insolvency.

3. Activity is confined to entities within the insurance industry.

Insurance company insolvencies are not governed by bankruptcy law, but by state insurance statutes governing liquidations and rehabilitations. *Universal Marine Ins. Co. v. Beacon Ins. Co.*, 768 F.2d 84, 88 (4th Cir. 1985). These state statutes are only designed to cover insurance company insolvency, and the authority vested therein is limited to the matters involving members of the insurance industry. The third criteria of *Pireno* is satisfied as well.

Finally, under the *National Securities* analysis, the Ninth Circuit incorrectly assumed that the company has ceased to exist and used this as the basis for concluding

that the priority scheme does not constitute the business of insurance. As explained above, the company has not ceased to exist until all of the affairs of the insolvent company have been concluded and this process involves the payment of claims to policyholders and other claimants, including the federal government.

III. The Ninth Circuit's decision conflicts with other decisions on the scope of the state commissioners' authority to rehabilitate or liquidate insolvent insurance companies.

Recent developments in the circuit courts have perpetuated the need for this Court to resolve the issue. Since this Court's denial of the petitioner's request in *Gordon v. United States Treasury*, yet another Circuit Court opinion has been rendered in *Lac D'Amiante Du Quebec, LTEE v. Am. Home Assurance Co.*, Nos. 87-5249, 87-5380, 87-5401 (3rd Cir. Dec. 28, 1988).[13] In *Lac D'Amiante*, the Third Circuit has reinforced the concept that the state's interest in regulating insolvent insurance companies is strong, that a complex regulatory scheme is in place to manage the rehabilitation or dissolution of companies and that the company's corporate charter does not cease to exist until the rehabilitation or liquidation process is complete.[14] Although the Third Circuit states that it did not specifically address McCarran-Ferguson preemption, its action in abstaining from asserting jurisdiction amounts to a deferral to state regulation. As the court explained, the Burford abstention doctrine stands for the proposition that federal courts should avoid needless disruption of an important, complex state regulatory

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13. 1988 U.S. App. Lexis 17590.

14. 1988 U.S. App. Lexis 17590.

scheme.[15] In this case, the Third Circuit went to great lengths to describe the extensive state regulatory scheme which exists and had little difficulty concluding that abstention was appropriate.

This recent Third Circuit decision is preceded by a similar conclusion in *Crist v. J. Henry Schroder Bank & Trust Co.*, 696 F. Supp. 981 (S.D. N.Y. 1988), and in *Grimes v. Crown Life Ins. Co.*, 857 F.2d 699 (10th Cir. 1988),[16] which conclusions are diametrically opposed to the Fourth and Ninth Circuit analyses.

More federal decisions on this identical issue are forthcoming. Another example is an action pending in Ohio. *Fabe v. United States Treasury*, No. C2-88-778, United States District Court, Southern District of Ohio. This case involves the liquidation of American Druggists Insurance Company which issued surety bonds. Cross motions are pending on the issue of whether the Ohio statutes constitute the "business of insurance" under the McCarran-Ferguson Act. The Sixth Circuit may therefore be called upon to address the issue in the near future.

In summary, the recent Circuit Court decisions have done nothing but exacerbate the confusion which exists concerning the states' authority to supervise rehabilitations and liquidations, and this uncertainty can only be resolved by this Court.

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15. 1988 U.S. App. Lexis 17590, p.8.

16. Petition for Certiorari filed Jan. 11, 1989, No. 88-1155.

IV. Practical difficulties and dislocations which have resulted from the Ninth Circuit's opinion merit consideration by this Court.

The Ninth Circuit's holding that the federal priority supersedes the state priority scheme does not simply dispose of the federal claims nor does it dispose of the commissioners' possible personal liability. Although the Idaho liquidator apparently is directed to pay the federal government claims before those of policyholders pursuant to the Ninth Circuit opinion, he, as commissioner, is still obligated to uphold the state law. He cannot uphold the state law and carry out the directives set forth in the Ninth Circuit's decision. The two are inconsistent and place the commissioner in a difficult circumstance. Further, the Ninth Circuit's decision would not necessarily be binding in another circuit. Countrywide uniformity is far from being accomplished as a result of either the Ninth or Fourth Circuit opinions.

Assuming that as a result of the Ninth Circuit's decision payment would now be appropriate, the state liquidator and the federal government confront numerous issues such as the dates which would bar further claims, cancellation dates and filing dates for claims, for example. Even when dealing with federal government claims, a liquidator should be afforded some finality to payment of those claims. The liquidator must be assured that once he or she pays the claims, the liquidator cannot be held responsible for those which are asserted at a later date. In the event of disputes over these and other issues, is the federal government bound by decisions of the court which is adjudicating the receivership or liquidation?

Another obvious question which might arise is whether the insolvent estate is entitled to recover any administrative expenses before paying the federal government. This question is not contemplated by the Ninth Circuit's decision. Also not contemplated by the Ninth Circuit's opinion is the injustice caused in cases in which the assets are not sufficient to cover either the federal government claims or the policyholder claims. There is no flexibility built into the federal statute, 31 U.S.C. § 3713, and no direction is furnished in the Ninth Circuit's opinion as to how this situation will be handled.

Another significant concern is the procedure by which a liquidator would ascertain the extent of the federal government claims. If the liquidator notified the federal government that a liquidation is pending, to whom would the notices be sent? Would one notice be sufficient? Also added to these concerns are issues which include but are not limited to rescission of the policies, jurisdiction and venue.

In light of these few considerations alone, it is evident that the decisions of the Fourth and Ninth Circuits have created a regulatory void of uncertainty which can only be filled on an ad hoc basis. An ad hoc approach is not desirable for either the federal government or state liquidators because, among other things, it leads to increased litigation. The NAIC, therefore, respectfully requests that the Court consider these issues in determining whether to grant the liquidator's petition for writ of certiorari.

SUMMARY OF ARGUMENT

The NAIC vigorously supports the liquidator's petition to this Court requesting a clarification of the law concerning the application of the McCarran-Ferguson Act to state liquidation proceedings. Resolution of this issue is urgent in light of conflicting opinions on the same issue between the Fourth Circuit and the Ninth Circuit and between these two circuits and the Second and Tenth Circuits. Just as importantly, the practical difficulties and dislocations which are now facing liquidators nationwide as a result of these decisions point out a critical need for this Court to furnish guidance on these issues and to eliminate the regulatory void which has been created.

CONCLUSION

For the foregoing reasons, the NAIC respectfully requests that this Court grant the liquidator's petition for a writ of certiorari.

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APPENDIX

APPENDIX A

McCarran-Ferguson Act

Chapter 20. REGULATION OF INSURANCE

§ 1011. Declaration of policy

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by State law; Federal Law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, that after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

§ 1013. Suspension until June 30, 1948, of application of certain Federal laws; Sherman Antitrust Act applicable to agreements to, or acts of, boycott, coercion, or intimidation

(a) Until June 30, 1948, the Act of July 2, 1980, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

§ 1014. Applicability of National Labor Relations Act and Fair Labor Standards Act of 1938

Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

§ 1015. Definition of "State"

As used in this chapter, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, Guam, and the District of Columbia.

APPENDIX B

31 U.S.C. § 3713

§ 3713. Priority of Government claims

(a)(1) A claim of the United States Government shall be paid first when—

(A) a person indebted to the Government is insolvent and—

(i) the debtor without enough property to pay all debts makes a voluntary assignment of property;

(ii) property of the debtor, if absent, is attached; or

(iii) an act of bankruptcy is committed; or

(B) the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor.

(2) This subsection does not apply to a case under title 11.

(b) A representative of a person or an estate (except a trustee acting under title 11) paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

APPENDIX C

NAIC Insurers Supervision, Rehabilitation and Liquidation Model Act

Section 42. Priority of Distribution

The priority of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is herein set forth. Every claim in each class shall be paid in full or adequate funds retained for such payment before the members of the next class receive any payment. No subclasses shall be established within any class. The order of distribution of claims shall be:

A. Class 1. The costs and expenses of administration, including but not limited to the following:

(1) the actual and necessary costs of preserving or recovering the assets of the insurer;

(2) compensation for all services rendered in the liquidation;

(3) any necessary filing fees;

(4) the fees and mileage payable to witnesses;

(5) reasonable attorney's fees;

(6) the reasonable expenses of a guaranty association or foreign guaranty association in handling claims.

B. Class 2. Debts due to employees for services performed to the extent that they do not exceed $1,000 and represent payment for services performed within one year before the filing of the petition for liquidation. Officers and directors shall not be entitled to the benefit of this prior-

ity. Such priority shall be in lieu of any other similar priority which may be authorized by law as to wages or compensation of employees.

C. Class 3. All claims under policies for losses incurred, including third party claims, all claims against the insurer for liability for bodily injury or for injury to or destruction of tangible property which are not under policies, and all claims of a guaranty association or foreign guaranty association. All claims under life insurance and annuity policies, whether for death proceeds, annuity proceeds, or investment values shall be treated as loss claims. That portion of any loss, indemnification for which is provided by other benefits or advantages recovered by the claimant, shall not be included in this class, other than benefits or advantages recovered or recoverable in discharge of familial obligation of support or by way of succession at death or as proceeds of life insurance, or as gratuities. No payment by an employer to his employee shall be treated as a gratuity.

D. Class 4. Claims under nonassessable policies for unearned premium or other premium refunds and claims of general creditors.

E. Class 5. Claims of the federal or any state or local government. Claims, including those of any governmental body for a penalty or forfeiture, shall be allowed in this class only to the extent of the pecuniary loss sustained from the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby. The remainder of

such claims shall be postponed to the class of claims under Subsection H.

F. Class 6. Claims filed late or any other claims other than claims under Subsection G and H.

G. Class 7. Surplus or contribution notes, or similar obligations, and premium refunds on assessable policies. Payments to members of domestic mutual insurance companies shall be limited in accordance with law.

H. Class 8. The claims of shareholders or other owners.

APPENDIX D

The following states have adopted the principle of paying policyholder claims before those of the federal government:

Alaska Stat. §§ 21.78.180 and 21.78.260 (1978); Ariz. Rev. Stat. Ann. §§ 20-629 (1982) and 20-637 (1984); Ark. Stat. Ann. § 23-68-126 (1988); Conn. Gen. Stat. § 38-462 (1980); Fla. Stat. § 631.271 (1987); Ga. Code Ann. § 33-37-20 (1986); Idaho Code § 41-3342 (1981); Ind. Code § 27-9-3-40 (1979); Iowa Code § 507C.42 (1988); Kan. Stat. Ann. § 40-3601 (1986); Ky. Rev. Stat. § 304.33-430 (1982); La. Rev. Stat. Ann. § 22:746 (1987); Maine Rev. Stat. Ann. tit. 24-A § 4379 (1980); Md. Code Ann. Art. 48A § 158A (1987); Mich. Comp. Laws § 500.7834 (1984); Minn. Stat. § 60B.44 (1987); Mont. Code Ann. § 33-2-1371 (1979); Neb. Rev. Stat. § 44-127.25 (1984); Nev. Rev. Stat. § 696B.420 (1980); N.H. Rev. Stat. Ann. § 402-C:44 1987); N.M. Stat. Ann. § 59A-41-44 (1984); N.Y. Ins. Law § 7435 (1985); N.C. Gen. Stat. § 58-155.15 (1987); Ohio Rev. Code Ann. § 3903.42 (1983); Okla. Stat. tit. 36 § 1927 (1983); Pa. Cons. Stat. § 40-11-426 (1982); R.I. Gen. Laws § 27-14-22 (1987); S.C. Code Ann. § 38-27-610 (1988); Tenn. Code Ann. § 56-9-127 (1981); Tex. Ins. Code Ann. § 21.28-B (1984); Utah Code Ann. § 31A-27-335 (1986); V.I. Code Ann. tit. 22, § 1277 (1985); W. Va. Code § 33-10-19a (1985); Wis. Stat. § 645.68 (1980); and Wyo. Stat. § 26-28-125 (1983).